

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,
vs.
MOTOROLA, INC., et al.,
Defendants.

MOTOROLA MOBILITY LLC, et al.,
Plaintiffs,
vs.
MICROSOFT CORPORATION,
Defendant.

Case No. C10-1823-JLR

PLAINTIFF MICROSOFT
CORPORATION'S BRIEF
CONCERNING THE USE OF THIRD-
PARTY CONFIDENTIAL
INFORMATION

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LAW OFFICES
CALFO HARRIGAN LEYH & EAKES LLP
999 THIRD AVENUE, SUITE 4400
SEATTLE, WASHINGTON 98104
TEL, (206) 623-1700 FAX, (206) 623-8717

1 Microsoft believes the procedure outlined by the Court in its November 12 ,2012 order
 2 (Dkt. No. 567) balances protection of confidential third-party information, the public right to
 3 access to the judicial process, and Microsoft’s right to fully present its case and to rebut the
 4 arguments advanced by Motorola. Motorola knew of the issues created by its planned reliance
 5 on third-party confidential information long ago. Motorola has argued for nearly a year that
 6 specific “confidential” licenses, including those to RIM and Nokia, justified its 2.25% demand
 7 of Microsoft—but not until the fourth day of trial did Motorola fully inform the Court of the
 8 “untenable position” that Motorola had created for itself by promising the third parties that it
 9 would not publicly disclose the terms of those licenses. Motorola chose long ago to build its
 10 case on evidence that it apparently cannot publicly disclose without breaching contracts made
 11 with the third parties. That decision was Motorola’s alone, and Motorola—not Microsoft, the
 12 Court, or the public—should bear any resulting consequences. The trial should proceed as
 13 contemplated by the Court in its November 12 order.

14 **A. Microsoft Must Be Afforded a Full and Fair Opportunity to Present its**
 15 **Case.**

16 As the Court is well aware, Motorola intends to present an argument that its 2.25%
 17 demand can be justified as “RAND” by reliance on certain license agreements Motorola
 18 contends are comparable to the good faith RAND royalty that should have been offered to
 19 Microsoft for the use of Motorola’s 802.11 and H.264 patents. The Court is also familiar with
 20 many of Microsoft’s arguments as to why these agreements are *not* comparable—including
 21 that the licenses in question concern different companies, different patents, different industry
 22 standards, different products, different standard-product relationships, and that some were
 23 entered into in economic and legal circumstances in which the licensee was highly vulnerable
 24 to hold-up or that reflected other tradeoffs. *See, e.g.*, Dkt. No. 396, Microsoft’s Rule 702
 25 Motion to Preclude Testimony By Charles R. Donohoe and Dr. R. Sukumar at 8–12; Dkt. No.
 423, Microsoft’s Reply in Support of its Rule 702 Motion to Preclude Testimony By Charles

1 R. Donohoe and Dr. R. Sukumar at 5–7; Dkt. No. 450, Microsoft’s Motions in Limine at 4–7
 2 (No. 2).

3 Motorola cannot rely on these agreements as claimed evidence of a RAND royalty
 4 while simultaneously using the agreements’ confidentiality provisions to prevent Microsoft
 5 from presenting evidence demonstrating that the agreements are not comparable, either from
 6 the contents of the agreements themselves, the contents of other documents in evidence
 7 concerning those licensees and their relationship with Motorola, or by eliciting witness
 8 testimony on these subjects. Microsoft must be permitted a full and fair opportunity to present
 9 its case, including an unrestricted right to cross-examine Motorola’s witnesses and examine its
 10 own expert during rebuttal on the subject of the license agreements, the licensees, and their
 11 products.

12 **B. Motorola’s “Coding” or “Exhibit Number” Proposal is Unworkable.**

13 Motorola’s proposal that the parties refer to Motorola’s license agreements by code
 14 names or exhibit numbers is unworkable. As Motorola is well aware, Microsoft contends that
 15 each of these agreements is not comparable for numerous licensee-specific reasons. Further,
 16 the royalty structures of specific licenses, coupled with information about the different
 17 products sold by the licensees, independently render them incomparable to the RAND royalty
 18 at issue here. “Coding” the licensee’s name or referring to the agreement by a number will not
 19 obscure the identity of the licensee, because Microsoft must be permitted to cross-examine
 20 Motorola’s witnesses on each of these licensee-specific facts—and the identities of the
 21 licensees *are* important. As the Court has already recognized, evaluating the comparability of
 22 a license agreement requires knowing who the licensee is, what products they make, and how
 23 they would value a license to certain Motorola standard-essential patent portfolios. Moreover,
 24 given the short amount of time remaining, the use of codes would unduly complicate and
 25

1 prolong examination of witnesses. Microsoft should not be forced to waste its allotted time in
2 this manner.

3 The authority Motorola cites in support of its “coding” proposal is of no help, because
4 none of the concerns here were present. In *Cryptography Research, Inc. v. Visa Int’l. Service*
5 *Ass’n*, No. C04–04143 JW (HRL), 2008 WL 346411 (N.D. Cal. Feb. 7, 2008), a magistrate
6 judge granted a motion to compel production of documents relating to any license agreements
7 between the plaintiff and a third party. *Id.* at *1–2. By agreement of the parties, and because
8 the third party had “satisfied the court that public disclosure of its name in this case would be
9 detrimental to it,” the magistrate judge referred to the third party as “Doe Corporation” in the
10 opinion. *Id.* at *1 & n. 3. In order to resolve the discovery dispute, the magistrate judge only
11 needed to note evidence that a third party likely had a licensing agreement of some kind with
12 the plaintiff, and that the defendant was entitled to further discovery into that agreement—the
13 parties agreed that no other specific facts about the third party, its operations, or the
14 circumstances of the possible license were relevant.

15 Trial resumes in less than 24 hours, and Motorola has provided Microsoft no concrete
16 suggestion of how it actually proposes to implement any coding scheme or new exhibit
17 numbering system for these licenses. Even if such methods were viable (and they are not), it
18 would be difficult and time-consuming for Microsoft to integrate those references throughout
19 its cross and direct examinations at this late hour.

20 **C. Motorola Voluntarily Chose Long Ago to Base its RAND Theory on Third-**
21 **Party Confidential Information.**

22 With full knowledge of the confidentiality provisions of its license agreements,
23 Motorola chose to advance a “bilateral negotiation” RAND theory in this case based entirely
24 on the contents of those agreements.¹ Motorola has known for many months that Microsoft

25 ¹ Motorola advanced the same theory—that the same license agreements proved that its 2.25% demand of
Microsoft was reasonable—in its ITC case against Microsoft, at least as early as January 2012.

1 vigorously disputed that these agreements were comparable, based on license- and licensee-
 2 specific facts—and in June 2012, the Court denied in part Microsoft’s motion for summary
 3 judgment *because* a detailed examination of those facts was necessary:

4 [A] determination of the relevance of Motorola’s prior license agreements is
 5 inherently fact intensive, more appropriate as a motion in limine, and cannot be
 6 decided at this time. To make such a determination, *the court must engage in a*
factual comparison between the circumstances of each prior agreement and the
circumstances that exist between the parties to this litigation[.]

7 Dkt. No. 335, Order at 26 (emphasis added). *See also* Dkt. No. 490, Daubert Order at 14
 8 (“Certainly, the applicability of Motorola’s license agreements, which Mr. Donohoe examines
 9 in determining the initial royalty rate of 2.25%, *should be subject to vigorous cross*
 10 *examination* with respect to their comparability to the present case.”) (emphasis added). So
 11 Motorola knew months ago that this evidence was highly likely to come out at trial, both in
 12 light of the Court’s rulings and the Ninth Circuit’s policies on public access to judicial
 13 information: “The resolution of a dispute on the merits, whether by trial or summary
 14 judgment, is at the heart of the interest in ensuring the ‘public’s understanding of the judicial
 15 process and of significant public events.’” *Kamakana v. City and County of Honolulu*, 447
 16 F.3d 1172, 1179 (9th Cir. 2006), quoting *Valley Broadcasting Co. v. U.S. Dist. Court for Dist.*
 17 *of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986). As Microsoft explained in its *Daubert* briefing,
 18 Motorola’s expert Charles Donohoe simply extracts a 2.25% royalty rate from those
 19 agreements, claims to perform a “modified *Georgia-Pacific* analysis” that leaves that rate
 20 unchanged, and declares that 2.25% is a RAND royalty. Because Motorola’s RAND theory
 21 begins and ends with these licenses, Motorola knew months ago that there was no possible way
 22 for the Court to find in its favor on the RAND issue other than in an opinion containing
 23 detailed analysis of the license agreements and licensees.

24 Motorola now informs the Court that its licensees have threatened legal action if
 25 Motorola uses the license agreements in this case and, as a result, the licenses’ terms are

1 publicly disclosed. This provides no ground for keeping the agreements under seal: “The
2 mere fact that the production of records may lead to a litigant’s embarrassment, incrimination,
3 *or exposure to further litigation* will not, without more, compel the court to seal its records.”
4 *Kamakana*, 447 F.3d at 1179 (emphasis added). Motorola decided to base its evidence of a
5 RAND royalty on license agreements that apparently bar it from using them in this manner.
6 That problem is entirely of Motorola’s own making.

7 It is not conceivable that Motorola failed to foresee—months ago—the problem it has
8 so belatedly raised. If Motorola ever had a valid argument for simultaneously relying on the
9 license agreements while precluding revelation at trial of identifying details, it waived it by its
10 failure to raise this issue until the *fourth day of trial* when time is already very compressed.

11 But the waiver is secondary. Motorola’s problem inheres in its strategy: it is the
12 sponsor of these license agreements as the foundation for its argument on the central issue in
13 this trial. Its argument depends on the very details of the licensing agreements that it seeks to
14 exclude from public view, and always has. No matter when Motorola first asked that these
15 details be obscured from public view, its position would have been untenable.

16 Motorola would like the Court to do what its experts have done—ignore the highly
17 material details of these agreements and look simplistically at the royalty rate or percentage.
18 Those details will compel the conclusion that the licenses have no probative value on the issue
19 before the Court, but that fact cannot be demonstrated without proof of, and testimony
20 regarding, those details.

21 The Court should proceed with its current plan for handling third-party confidential
22 information.

1 DATED this 18th day of November, 2012.

2 CALFO HARRIGAN LEYH & EAKES LLP

3 By s/Arthur W. Harrigan, Jr.
4 Arthur W. Harrigan, Jr., WSBA #1751
5 Christopher Wion, WSBA #33207
Shane P. Cramer, WSBA #35099

6 By s/ T. Andrew Culbert
7 T. Andrew Culbert
8 David E. Killough
MICROSOFT CORPORATION
9 1 Microsoft Way
Redmond, WA 98052
Phone: 425-882-8080
10 Fax: 425-869-1327

11 David T. Pritikin
12 Richard A. Cederroth
Constantine L. Trela, Jr.
13 William H. Baumgartner, Jr.
Ellen S. Robbins
14 Douglas I. Lewis
David C. Giardina
15 John W. McBride
David Greenfield
16 Nathaniel C. Love

17 SIDLEY AUSTIN LLP
18 One South Dearborn
Chicago, IL 60603
19 Phone: 312-853-7000
Fax: 312-853-7036

20 Carter G. Phillips
21 Brian R. Nester

22 SIDLEY AUSTIN LLP
23 1501 K Street NW
Washington, DC 20005
24 Telephone: 202-736-8000
Fax: 202-736-8711

25 Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Susie Clifford, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 18th day of November, 2012, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

Ralph Palumbo, WSBA #04751
Philip S. McCune, WSBA #21081
Lynn M. Engel, WSBA #21934
Summit Law Group
315 Fifth Ave. South, Suite 1000
Seattle, WA 98104-2682
Telephone: 206-676-7000
Email: Summit1823@summitlaw.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

Steven Pepe (*pro hac vice*)
Jesse J. Jenner (*pro hac vice*)
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9046
Email: steven.pepe@ropesgray.com
Email: jesse.jenner@ropesgray.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

Norman H. Beamer (*pro hac vice*)
Ropes & Gray LLP
1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: (650) 617-4030
Email: norman.beamer@ropesgray.com

____ Messenger
____ US Mail
____ Facsimile
 X ECF

1 Paul M. Schoenhard (*pro hac vice*)

2 Ropes & Gray LLP

3 One Metro Center

4 700 12th Street NW, Suite 900

5 Washington, DC 20005-3948

6 Telephone: (202) 508-4693

7 Email: Paul.schoenhard@ropesgray.com

____ Messenger

____ US Mail

____ Facsimile

X ECF

8 DATED this 18th day of November, 2012.

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____ s/Susie Clifford

Susie Clifford